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No. 95-2074

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

CITY OF BOERNE, TEXAS
Petitioner,
vs.
P.F. FLORES, ARCHBISHOP OF SAN ANTONIO and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATEMENT OF RESPONDENT FLORES IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. (1994), is a facially valid exercise of Congressional power to enforce the Fourteenth Amendment.

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INTRODUCTORY STATEMENT

Respondent Flores joins petitioner in urging the Court to grant certiorari in this case.

The reason for reviewing this case is not any urgent need to relieve state and local governments of the rather modest burden of making occasional exceptions, where possible, to accommodate the religious faith and practice of the American people. The real problem is that nearly three years after Congress passed the Religious Freedom Restoration Act by overwhelming margins, vociferous and persistent claims that it is unconstitutional have created uncertainty that hampers enforcement of the Act in this case and in many other cases. The arguments on each side are fully developed and ripe for review by this Court. Only a decision by this Court can resolve the uncertainty and clear the way to compliance with the Act either generally or in this case.

STATEMENT OF THE CASE

1. The Underlying Dispute. This case involves the right of access to the Roman Catholic Mass in St. Peter Church in Boerne, Texas. The church was built in 1923 and is now far too small to seat the parishioners who wish to attend scheduled services. Comp. par. 25 at R.546; *see* Stip. par. o at R.590. The City has refused every request for a permit to enlarge the church building to make it adequate to the parish's needs. Stip. par. v, y, cc at R.591. An undisputed affidavit from the pastor states that would-be worshipers have regularly been "turned away for lack of standing room." R.255-56.[1]

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[1] Pages from the Record are cited as R. The Petition for Writ of Certiorari is cited as Pet.; the Appendices to that Petition are cited as Pet.

The church is not an historic landmark. Stip. par. t at R.590. However, the front facade of the church is now located within the historic district authorized by Ordinance 91-05 and created by Ordinance 91-15 of the City of Boerne. The City created this historic district after the church leadership had already begun active planning to expand the church building. Comp. par. 9 at R.541-42; Stip. par. h at R.590. But the church leadership relied on the stated boundaries of the historic district, which ran through the church immediately behind the front facade. Comp. par. 11 at R.542; *see* Stip. par. s at R.590. The church did not oppose inclusion of the front facade in the historic district; instead, the church leaders designed a new church structure that would preserve the front facade. Comp. par. 12 at R.543. But the City refused to issue a building permit for any plan that included demolition of that part of the church outside the historic district, Comp. par. 13-15 at R.543-44, and three years later, in Ordinance 94-17, the City amended the district's boundaries to include the entire church. Stip. par. gg at R.592. All further negotiations have been fruitless. Stip. par. cc at R.591.

The pastor's undisputed affidavit states that St. Peter Church has 2,170 members, that it expects to have 2,750 members by the year 2000, that it can seat only 230 of these members at a time, and that 40 to 60 more than that regularly attempt to attend 11:00 Mass on Sunday. R.255-56. Some of these people stand in the aisles; some are turned away. *Id.* The record does not indicate how many are turned away at Christmas and Easter, or how many gave up trying to attend. An undisputed affidavit from the

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App. Except as otherwise noted in text, all facts are taken from a stipulation of the Archbishop and the City (Exhibit 5-PTO, Stipulated Facts, cited as Stip.), or from the Second Amended Complaint (cited as Comp.). The Complaint is taken as true on this petition, which grows out of a judgment dismissing plaintiff's claim on the pleadings.

Archbishop states that he cannot relieve the situation by assigning an additional priest. R.252. Although the record does not reflect the fact, the church is now celebrating Mass in an ill-suited secular auditorium.

2. The Litigation Below. Respondent, the Roman Catholic Archbishop of San Antonio, owns the real property of St. Peter Church. He filed this action seeking relief under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. (1994) (RFRA or the Act). He also asserted state and federal constitutional claims not at issue in this Court. The City challenged the constitutionality of RFRA, and the United States intervened as a defendant. Pet. App. 32a. The District Court held that RFRA is unconstitutional, *id.* at 28a, and certified this judgment for interlocutory appeal of a controlling question of law under 28 U.S.C. §1292(b) (1994). Pet. App. 28a-29a.

Because the District Court's judgment was in effect a dismissal of the Archbishop's RFRA claim, the Court of Appeals treated it as a final judgment on a severable issue. Pursuant to longstanding circuit precedent, the Court of Appeals treated the certification under §1292(b) as more appropriately a certification under Fed. R. Civ. Proc. 54(b). *See* Pet. App. 3a.[2] On the merits, the Court of Appeals reversed.

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[2] Out of an abundance of caution, the Archbishop and the United States each filed a petition for leave to appeal under §1292(b) and a notice of appeal under Rule 54(b). Pet. App. 3a. The order granting appeal under Rule 54(b) is not reprinted in Pet. App. To comply with Supreme Court Rule 14(*i*)(ii), that order is reprinted as an Appendix to this Statement.

3. The Statute at Issue. The President signed the Religious Freedom Restoration Act on November 16, 1993. It had passed the House of Representatives by unanimous voice vote, 139 Cong. Rec. H8715 (daily ed. Nov. 3, 1993), and the Senate by a vote of 97-3, 139 Cong. Rec. S14470 (daily ed. Oct. 27, 1993).

RFRA creates a statutory right to the free exercise of religion. The central provision of the Act provides:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1(b) (1994).

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

42 U.S.C. §2000bb-1(c) (1994).

This *statutory* right is in aid of the narrower *constitutional* right to the free exercise of religion. Under this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Constitution permits neutral and generally applicable laws to be applied in ways that suppress religious practices. The government need not justify the resulting burden on religion. *Id.* at 885. But for laws that are not neutral and generally applicable -- most obviously, for laws that deliberately target religion or laws that, when read in light of related legislation, are revealed to overtly discriminate against religion -- the resulting burdens on

religion must be justified by a compelling interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-40, 546-47 (1993); *Smith*, 494 U.S. at 877-79.

RFRA creates a statutory right that is more protective of religious exercise. Under RFRA, the compelling interest test applies to any substantial burden on religious exercise, "even if the burden results from a rule of general applicability." 42 U.S.C. §2000bb-1(a) (1994). The religious claimant need not prove overt or intentional discrimination. Thus, the essential difference between the constitutional and statutory standards is in the threshold showing required to shift the burden of justification to the government. It is a variation on the familiar difference between intention and effect. Any substantial burden on religion requires justification under RFRA; only overt or deliberate discrimination requires justification under the Constitution.

REASONS FOR GRANTING THE WRIT

I. The Issue Is Important, and an Act of Congress Cannot Be Effectively Enforced Until This Issue Is Resolved.

A. The Public's Interest in Resolution of This Issue.

Any serious question about the constitutionality of an Act of Congress deserves review by this Court. This Court frequently reviews the constitutionality of federal statutes without waiting for a split in the appellate courts or for an appellate decision invalidating the statute. For example, there appears to have been no split of appellate authority on the constitutionality of the federal statutes at issue in *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*,

116 S.Ct. 2374 (1996); *Felker v. Turpin*, 116 S.Ct. 2333 (1996); or *Colorado Republican Campaign Comm. v. Federal Election Comm'n*, 116 S.Ct. 2309 (1996).

The constitutional question here has become serious, even though we believe the City's arguments are quite implausible, because these arguments are so persistently and vociferously asserted that they significantly hamper enforcement of the Act. Every appellate court to consider a constitutional attack on RFRA has upheld the statute, yet the frequency of constitutional attacks is actually increasing as knowledge of the possibility of these attacks spreads among the bar.

It is difficult to settle cases until these constitutional doubts are resolved, because attorneys for litigants resisting enforcement believe that the claim might go away if RFRA is held unconstitutional. It is nearly as difficult to try cases, because the issues to be tried depend on resolution of the constitutional question. If RFRA is constitutional, religious claimants must prove a substantial burden on the exercise of their religion; if RFRA is unconstitutional, religious claimants must prove overt discrimination or anti-religious motive, or they must fit themselves into one of *Smith*'s numerous exceptions, or they must prove other claims unrelated to religious liberty. Resourceful lawyers may offer evidence under any of these theories, but the litigation takes a very different course depending on which is emphasized.

The constitutionality of RFRA is important to a substantial number of cases, although the City exaggerates the number of decided cases to date, and it certainly exaggerates the burden of compliance on government agencies. Government can still regulate or even suppress religious practices when there is compelling reason to do so; what RFRA takes away is government's right to burden the

exercise of religion for reasons that are merely rational or desirable but not essential.

The City's claim of more than two hundred cases appears to be based on how many times the phrase "Religious Freedom Restoration Act" appeared in a Westlaw search. This method includes every casual reference to the Act, including all cases that quote the attorneys' fees statute, 42 U.S.C. §1988(b) (1994), whether or not they have anything to do with religion; all cases that say, "No issue is presented under the Religious Freedom Restoration Act;" and so on. With or without any correction for the City's exaggerated count, the frequency of RFRA disputes is infinitesimal compared to the untold millions of times each year that individuals and organizations comply with government regulations or have those regulations enforced against them. But each meritorious RFRA claim is of vital importance to the claimant. Each meritorious RFRA claim is brought on behalf of one or more Americans whose exercise of religion has been suppressed, burdened, or penalized without sufficient cause.

Each of these claims is important to the religious believers affected, and each of these claims is hampered by the current uncertainty about the constitutionality of the Act. Whatever disagreements there may be about the most desirable level and most appropriate mechanisms of legal protection for religious liberty, there is agreement among all three branches of government, the Framers of the Constitution, and the traditions of the American people, that the exercise of religion is of profound importance to each individual and religious group. This Court should grant certiorari to remove the constitutional doubt about Congress's effort to protect this important right.

B. The Archbishop's Interest in Resolution of This Issue.

Because of the procedural posture of this case, denial of certiorari would not reduce the uncertainty even for Archbishop Flores and St. Peter Church. The Petition for Writ of Certiorari demonstrates the City's unwillingness to accept the judgment of the Court of Appeals, and the City could raise the issue again on remand.

The District Court dismissed the RFRA claim; the Court of Appeals reversed that judgment and reinstated the RFRA claim for trial. Trial of this case would proceed under the cloud of continuing constitutional challenge to the Act in other cases, and with the knowledge that if this Court were to invalidate RFRA in some other case, before exhaustion of all appeals from a second final judgment in this case on remand, the new decision could still be applied to this case. Any such new decision by this Court would override law of the case in the lower courts, *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1370 (5th Cir. 1992), and in any event, the City could present its constitutional challenge on a second petition for certiorari after trial and a second appeal, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 881 n.1 (1990).

Because the City apparently believes that there is a substantial chance that this Court will ultimately invalidate RFRA, there would be little prospect of settlement after a denial of certiorari at this stage. Because of the possibility that a decision invalidating RFRA might yet be applied to this case, the District Judge and the parties would be forced to give full attention to the other counts of the complaint, which allege claims under the Free Exercise Clause, the Free Speech and Assembly Clauses, the Takings Clause, the Due Process and Equal Protection Clauses, and the Texas Constitution. Comp. par. 32-52 at R.549-57.

Thus, the salutary purposes of appeals under Rule 54(b) and §1292(b) would be wholly lost to the parties and to the courts below if certiorari is denied. The appeal to the Court of Appeals would have accomplished nothing by way of simplifying the litigation on remand. We obviously do not suggest that every appeal under Rule 54(b) or §1292(b) deserves review by this Court. But here, the issue is recurring and sufficiently important that this Court is likely to review it sooner or later, the City will have later opportunities to apply any change in law to this case, and the City has demonstrated its willingness to bring the issue to this Court. This combination of circumstances defines a narrow class of cases in which denial of certiorari would render Rule 54(b) and §1292(b) illusory.[3]

If the constitutionality of RFRA were not deserving of this Court's review, then the needs of the litigants and the courts below would not be a reason to grant certiorari. But if, as we believe, the *issue* is deserving of this Court's

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[3] Where the underlying issue deserves review by this Court, the need for further proceedings on remand is of course no barrier to review. For opinions reviewing on certiorari questions presented pursuant to certification under §1292(b), *see, e.g., United States v. Winstar Corp.*, 116 S.Ct. 2432, 2447 (1996); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S.Ct. 619, 622-23 (1996); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322, 2325-26 (1995). For cases where, as here, the District Court entered a final judgment on a severable issue pursuant to Rule 54(b), the Court of Appeals reversed and remanded, and this Court granted certiorari without awaiting the remand, see *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 263-64 (1992); *Mireles v. Waco*, 502 U.S. 9, 11 (1991). The same procedural posture is presented in any case in which a Court of Appeals reverses and remands a final judgment of a District Court, whether or not the final judgment was on a severable issue. Grants of certiorari in this situation are routine. *See, e.g., Board of County Comm'rs, Wabaunsee County v. Umbehr*, 116 S.Ct. 2342, 2346 (1996); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 116 S.Ct. 2309, 2314 (1996); *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2249-50 (1996).

review eventually, then the needs of the litigants and the courts below are a reason to review the issue in *this case*, and not wait for some other case. It is important to the Archbishop, to the City, and to the District Judge, to get this issue resolved before trial.

II. The Arguments on Both Sides Have Been Adequately Developed; There Is No Need to Await a Split of Appellate Authority.

There is no split of appellate authority. Five appellate courts have now upheld the Act; no appellate court has struck it down. But the arguments against the constitutionality of RFRA are fully developed in separate opinions by individual appellate judges, in a minority of district court and bankruptcy court opinions, and in a large law review literature. We briefly review the contributions to this debate.

Judge Higginbotham's careful, persuasive, and unanimous opinion for the Court of Appeals rejects each of the constitutional challenges presented here. *Flores v. City of Boerne*, 73 F.3d 1352, *reh'g en banc denied without a poll of the judges*, 83 F.3d 421 (5th Cir. 1996).

Judge Posner's unanimous opinion for the Seventh Circuit also rejects each of the constitutional challenges presented here. *Sasnett v. Sullivan*, 1996 Westlaw 432348 (7th Cir., Aug. 2, 1996).

Judge Buckley's opinion for the D.C. Circuit upholds the Act as applied to federal law. *EEOC v. Catholic Univ.*, 83 F.3d 455, 469-70 (D.C. Cir. 1996). That opinion rejects two of the arguments presented here -- that RFRA violates the Establishment Clause and that it violates separation of powers. The questions relating to Section 5 of the Fourteenth Amendment were not presented in that case.

The Wisconsin Appellate Court held that Congress has power to enact RFRA under Section 5 of the Fourteenth Amendment. *State v. Miller*, 538 N.W.2d 573, 577 (Wis. App. 1995), *aff'd on other grounds*, 549 N.W.2d 235 (Wis. 1996) (upholding the religious liberty claim under the state constitution).

The Appellate Division of the New Jersey Superior Court unanimously upheld RFRA in *South Jersey Catholic School Teachers Ass'n v. St. Teresa of the Infant Jesus Elem. School*, 675 A.2d 1155, 1167 (N.J. Super. App. Div. 1996), *petition for certification pending on other grounds* (N.J., No. 42523).

Notwithstanding this unanimity of result at the appellate level, the arguments for the unconstitutionality of RFRA are fully developed elsewhere. For separate opinions by appellate judges who would invalidate the Act, *see Hamilton v. Schriro*, 74 F.3d 1545, 1561-70 (8th Cir. 1996) (McMillian, J., dissenting), *petition for cert. filed* (No. 96-5016); *Smith v. Fair Empl. & Hsg. Comm'n*, 913 P.2d 909, 931-39 (Cal. 1996) (Mosk, J., concurring), *petition for cert. filed*, 65 U.S.L.W. 3095 (July 8, 1996) (No. 96-31); *State v. Miller*, 538 N.W.2d 573, 580-81 (Wis. App. 1995) (Sundby, J., dissenting). The petitions for certiorari in *Hamilton* and *Smith* do not present the question whether RFRA is constitutional.

Two district judges and one bankruptcy judge have published opinions invalidating the Act. *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591 (D. Md. 1996), *interlocutory appeal denied* (4th Cir. No. 96-564 and 96-565); *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996); *In re Tessier*, 190 B.R. 396

(Bankr. D. Mon. 1995), *appeal dismissed as moot* (Bankr. 9th Cir. No. MT-95-2336), *appeal pending*.[4]

A larger number of district court judges have published opinions upholding the Act. This respondent is aware of *Abordo v. Hawaii*, 902 F. Supp. 1220, 1229-34 (D. Haw. 1995) (Kay, J.); *Sasnett v. Sullivan*, 891 F. Supp. 1305, 1315-21 (W.D. Wis. 1995), *aff'd*, 1996 Westlaw 432348 (7th Cir., Aug. 2, 1996); *Belgard v. Hawaii*, 883 F. Supp. 510, 512-17 (D. Haw. 1995) (Gillmor, J.); and *Campos v. Coughlin*, 854 F. Supp. 194, 204 n.7 (S.D.N.Y. 1994) (dictum). The two judges from the District of Hawaii reached the same conclusion independently; *Abordo* cites *Belgard* only in passing.

There is a large law review literature on both sides of the question; most of these articles are collected in the Petition for Certiorari at 12-14 n.14. Two omissions are Douglas Laycock, *Congress, RFRA, and the Ratchet*, 56 Mont. L. Rev. 145 (1995), and Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221.

In short, the issue is fully joined. RFRA's opponents have not won a case at the appellate level, but they have been diligent and creative, and there is nothing to be gained by awaiting further developments in the lower courts.

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[4] In *Tessier*, the bankrupt debtors who invoked the Act have not appealed, and the case appears to be moot as to them. The United States has appealed the judgment that RFRA is unconstitutional, first to the Bankruptcy Appellate Panel, and now to the Court of Appeals. If and when this case arrives in this Court, it will come with a significant threshold issue of justiciability.

III. The Issue Is Squarely and Cleanly Presented Here.

There are no jurisdictional, procedural, or non-constitutional substantive issues in this case that could interfere with a square decision on the important issue presented. The District Court's judgment was a final judgment dismissing the RFRA count on the ground that the statute is unconstitutional. Only that issue is presented on appeal.

For reasons that inhere in the procedure of federal and most state courts, most cases will not present the constitutional issue so cleanly. Defendants typically challenge the constitutionality of RFRA on a motion to dismiss or motion for summary judgment. A trial judge who upholds the Act and denies defendant's motion has not entered a final judgment. Nor has he done anything surprising, given the presumption of constitutionality that attaches to an Act of Congress, so he is unlikely to certify the question for interlocutory appeal. Indeed, we are aware of no other case in which both the district court and the court of appeals have permitted an appeal before entry of a final judgment on all the issues in the case.

A trial judge who upholds the Act will then go on to consider factual and statutory grounds for decision of the RFRA count, and sometimes, alternate grounds for relief. This produces a mix of issues in the appellate court, all subject to the rule that constitutional grounds for decision should be avoided where possible. Constitutional challenges to RFRA thus may complicate and prolong litigation and hamper enforcement of the Act, and then disappear no matter which side wins on other grounds. Thus, in *State v. Miller*, the constitutional issue was decided in the Court of Appeals, but not in the Wisconsin Supreme Court, where the religious claimant prevailed on state constitutional grounds. *State v. Miller*, 538 N.W.2d 573 (Wis. App. 1995), *aff'd on*

other grounds, 549 N.W.2d 235 (Wis. 1996). In *South Jersey Catholic School Teachers Ass'n v. St. Teresa of the Infant Jesus Elem. School*, 675 A.2d 1155, 1167 (N.J. Super. App. Div. 1996), the constitutional issue was decided and the Act upheld, but the court went on to rule against the religious claimant on other grounds. The constitutional issue is not presented by either side in the Petition for Certification now pending in the New Jersey Supreme Court (No. 42523).

The constitutional issue has been argued but not decided in many cases. This respondent is aware of reported opinions in *Thiry v. Carlson*, 78 F.3d 1491, 1495 n.1 (10th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3856 (June 14, 1996) (No. 95-2022); *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996), *petition for cert. filed* (No. 96-5016); *see id.* at 1558-59 (McMillian, J., dissenting); *Cochran v. Morris*, 73 F.3d 1310, 1317 n.3 (4th Cir. 1996); *see id.* at 1321 (Michael, J., dissenting); *Haff v. Cooke*, 923 F. Supp. 1104, 1113 (E.D. Wis. 1996); *Muhammad v. City of New York*, 904 F. Supp. 161, 166 & n.1 (S.D.N.Y. 1995); *Snyder v. Murray City Corp.*, 902 F. Supp. 1444, 1447, 1450 n.12 (D. Utah 1995); *Reimann v. Murphy*, 897 F. Supp. 398, 401 (E.D. Wis. 1995); *George v. Sullivan*, 896 F. Supp. 895, 897-98 (W.D. Wis. 1995); and *Van Dyke v. Washington*, 896 F. Supp. 183, 190 (C.D. Ill. 1995). We are also aware of unreported opinions in which the issue was argued but not decided.

We do not mean to exaggerate the point; sooner or later the issue will again be squarely presented to this Court. But in the meantime, continuing constitutional doubts will hamper enforcement of the Act. The difficulty of enforcement will aggravate the burdens on the religious liberty of those who present claims under the Act.

IV. The Issue Will Be Better Briefed If It Is Not Combined With Novel Issues of Statutory Interpretation In the Same Case.

The constitutional issues will be better briefed and better argued in a case that presents no other issues. The attacks on RFRA present multiple issues for briefing in one case, even if the case is confined to the constitutionality of the Act. Thus the City claims that the Act violates the Tenth Amendment, the Establishment Clause, and the separation of powers, and that it exceeds Congressional power under Section 5 of the Fourteenth Amendment. This range of issues is typical of the litigating position of attorneys attacking the Act. This Court would not be well served by considering the constitutional issues in a case in which novel and important issues of statutory interpretation were presented for the first time.

Such issues of statutory interpretation are now before the Court or on their way to the Court. The petition in No. 96-31, *Smith v. Fair Empl. & Hsg. Comm'n*, presents an important question about the meaning of "substantial burden." The petition in No. 96-5016, *Hamilton v. Schriro*, presents an important question about the burdens of production and persuasion in litigation over compelling interests. Similarly important questions of statutory interpretation are pending in the lower courts. For example, multiple courts have been required to hold that the Act protects religiously motivated conduct, and not just conduct that is religiously compelled. *See In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996); *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996); *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1444 (W.D. Wis. 1995), *aff'd*, 1996 Westlaw 432348 (7th Cir., Aug. 2, 1996); *Muslim v. Frame*, 891 F. Supp. 226, 231 (E.D. Pa. 1995), *modified on other grounds*, 897 F. Supp. 215 (E.D. Pa. 1995). Proper resolution of issues such as these could set the statute on a course toward

workable and effective enforcement; improper resolution could make the statute a dead letter, or less likely, unworkably extreme. Issues of constitutionality and of statutory interpretation are each sufficiently important to deserve full and undivided briefing.

V. This Case Should *Not* Be Held for *Printz v. United States*.

The petition prays that the writ should be granted, or in the alternative, that the case be held "for determination of *Printz v. United States*, No. 95-1478, *cert. granted*," 116 S.Ct. 2521 (1996). Pet. at 27. This alternative prayer for relief relates to the City's argument that RFRA somehow violates the constitutional rule against "commandeering" state governments. *Printz* presents the question whether the rule against commandeering state regulatory processes extends to federal delegation of ministerial tasks to state employees.

It is clear that no issue of commandeering is presented in this case. The Court's commandeering doctrine forbids the United States to specify a particular policy solution that can be implemented only through affirmative governmental regulation, and then commandeer state government to enact the regulations and implement the policy. "The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992). But:

> The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes.

Id.

There may be cases where this difference is fine, but this is not one of them. RFRA requires no affirmative act by any government or government official; it requires only that certain religious practices be left *un*regulated. State and local governments are free to enact any policy they desire and to enforce it against all those persons whose objection is not religiously motivated -- typically an overwhelming majority of the population. With respect to those few persons whose religious practice is substantially burdened by a government policy, the governmental unit has a wide range of options. It can repeal the burdensome policy as to everyone; it can narrow the policy as to everyone but in a way that excludes the religious act from the policy's scope; it can retain the policy without change and exempt the burdened religious exercise; it can retain the policy unchanged and without exemption if the burden on religion serves a compelling interest by the least restrictive means; or it can craft some combination of these alternatives. These choices are left entirely to the state or local government.

Far from mandating affirmative regulatory acts, RFRA merely pre-empts regulation in limited areas and with respect to limited groups. To the extent that it can be said to mandate anything, it mandates the absence of regulation. There is no plausible claim that it commandeers state regulatory processes. Judge Posner properly gave this argument short shrift in the Seventh Circuit case: "It [RFRA] does not enlist state officials as federal functionaries. It does not make the states dance to a federal tune . . ." *Sasnett v. Sullivan*, 1996 Westlaw 432348 at *4 (7th Cir., Aug. 2, 1996).

We also note that the Court has developed its modern commandeering doctrine in the context of Article I powers, relying on the view that Article I empowers Congress to regulate individuals, not governments. *New York v. United States*, 505 U.S. 144, 162-66 (1992). The Fourteenth

Amendment is of course an explicit limitation on state power, and Section 5 of that Amendment is a plenary grant of power to Congress to enforce the Amendment. *See, e.g., Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1125, 1128 (1996) (distinguishing the Fourteenth Amendment from Article I, and recognizing that the Fourteenth Amendment "fundamentally altered the balance of state and federal power" (*id.* at 1125)); *City of Rome v. United States*, 446 U.S. 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'"); *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 347-48 (1879) (holding that the Fourteenth Amendment overrode a nineteenth century version of the commandeering doctrine).

Printz v. United States is therefore doubly inapposite: because this case is not plausibly about commandeering, and because *Printz* is not about Congressional action to enforce the Fourteenth Amendment. The Court should decide this case on its own merits, and not hold it for *Printz*.

VI. A Brief Response to The Petition's Comments on the Merits.

Much of the petition is devoted to preliminary argument on the merits, which of course are not yet at issue. Most of the erroneous claims in the petition can be corrected simply by reading Judge Higginbotham's opinion for the Court of Appeals. But the impression that the petition attempts to create should not go unremarked. RFRA is not different in kind from many other acts to enforce the Reconstruction Amendments.

Congress has not attempted to dictate to the courts the meaning of constitutional protection for the free exercise of religion; it is undisputed that *Employment Div. v. Smith*, 494

U.S. 872 (1990), remains the law of the Free Exercise Clause until and unless this Court changes its interpretation. Rather, Congress has created a new statutory protection for free exercise. The statutory text is not even ambiguous with respect to whether it creates a statutory right or ineffectually attempts to amend the Constitution without invoking the procedures of Article V. Even if the text were ambiguous, standard canons of interpretation would preclude the City's attempt to interpret the Act in a way that would make it ineffectual and unconstitutional.

With respect to state and local governments, Congressional power to enact RFRA is found in Section 5 of the Fourteenth Amendment, which authorizes Congress "to enforce, by appropriate legislation, the provisions of this article." A long and unbroken line of interpretation in this Court holds that Congressional power to enforce constitutional amendments includes power to enact prophylactic rules that go beyond what the judiciary would enjoin on its own interpretation of the Amendment. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) ("The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.") (plurality opinion by Justice O'Connor, joined by Chief Justice Rehnquist and Justice White); *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (upholding Congressional power to remedy discriminatory effects in government contracting, without proof of discriminatory purpose and without formal findings) (plurality opinion by Chief Justice Burger, joined by Justices Powell and White); *id.* at 499-502, 507-10 (Powell, J., concurring); *City of Rome v. United States*, 446 U.S. 156, 172-83 (1980) (upholding Congressional power to ban voting practices with discriminatory effects, without proof of discriminatory purpose); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (upholding Congressional power to

ban private discrimination as a means of enforcing the Thirteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968) ("Congress has power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." (*id.* at 440)); *Katzenbach v. Morgan*, 384 U.S. 641, 648-56 (1966) (upholding the Voting Rights Act's ban on English language literacy tests for voting, as applied to voters educated in American-flag Spanish-language schools, without proof of discriminatory purpose); *South Carolina v. Katzenbach*, 383 U.S. 301, 325-37 (1966) (upholding the Voting Rights Act's broad array of intrusive prophylactic means to secure voting rights); *James Everard's Breweries v. Day*, 265 U.S. 545, 558-59 (1924) (holding that Congress could ban sales of alcohol for medicinal purposes as a prophylactic means to enforce Eighteenth Amendment ban on sales for beverage purposes); *Ex parte Virginia*, 100 U.S. 339, 345 (1879) ("It is the power of Congress which has been enlarged" by the Fourteenth Amendment).

We have saved for special mention one case in this line, because it is misstated in the Petition for Certiorari. Pet. at 24. The case is *Oregon v. Mitchell*, 400 U.S. 112 (1970), which unanimously reaffirmed Congressional power to go far beyond judicial interpretation of the Constitution in the Voting Rights Act Amendments of 1970. *See id.* at 131-34 (opinion of Justice Black, upholding nationwide ban on literacy tests without proof of discriminatory purpose); *id.* at 144-47 (opinion of Justice Douglas) (same, noting that Congress "need not make findings as to the incidence of literacy" (*id.* at 147)); *id.* at 216-17 (opinion of Justice Harlan) (same, relying on Congressional power to enforce the Fifteenth Amendment, "[d]espite the lack of evidence of specific instances of discriminatory effect or application" (*id.* at 216)); *id.* at 231-36 (opinion of Justices Brennan, White, and Marshall) (same, relying on Congressional power to ban

practices with discriminatory effects); *id.* at 282-84 (opinion of Justice Stewart, joined by Chief Justice Burger and Justice Blackmun) (same, joining Justice Black's opinion on this issue, and noting that "Congress may paint with a much broader brush than may this Court" (*id.* at 284)). *See also Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) (noting that in *Oregon v. Mitchell*, "[t]he Court was unanimous, albeit in separate opinions," in holding that Congress could prohibit voting tests with "discriminatory effects only") (plurality opinion by Chief Justice Burger, joined by Justices Powell and White).

In the cases cited so far, the Court upheld Congressional power to ban state practices that the Court itself was not prepared to hold unconstitutional. The Constitution as judicially interpreted neither authorized nor forbad these practices. It is perhaps even more striking that Congress has power under Section 5 to override constitutional provisions that limit remedies against state governments. Congress may exercise this power in aid of constitutional rights, whether or not plaintiff proves a constitutional violation that courts would recognize. *See Maher v. Gagne*, 448 U.S. 122, 130-33 (1980) (holding that Congress can authorize attorneys' fees against state officials who would be immune under judicial interpretation of the Eleventh Amendment, following settlement of statutory claim pendent to a substantial constitutional claim, without proof of constitutional violation that would be recognized by courts); *Hutto v. Finney*, 437 U.S. 678, 693-700 (1978) (holding that Congress can authorize attorneys' fees against state officials who would be immune under judicial interpretation of the Eleventh Amendment, in suit to enforce incorporated rights, and describing Congressional power to enforce the Fourteenth Amendment as "plenary" (*id.* at 693, 698-99 n.31)); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that Congress can impose monetary liability on state officials who would be immune under judicial interpretation of the

Eleventh Amendment). This line of cases was most recently reaffirmed in *Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1125, 1128 (1996).

In still other cases where Congressional efforts to enforce the Reconstruction Amendments have gone beyond what this Court would require by judicial interpretation, this Court has enforced the statutes without questioning their constitutionality. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 171-75 (1989) (reaffirming *Jones v. Alfred H. Mayer Co.*, without reconsidering the constitutional question); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (enforcing the religious accommodation provisions of Title VII against local government); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (enforcing the Voting Rights Act Amendments of 1982); *Arizona Governing Comm'n v. Norris*, 463 U.S. 1073 (1983) (enforcing the sex discrimination provisions of Title VII against state insurance and pension plans); *Connecticut v. Teal*, 457 U.S. 440 (1982) (enforcing the disparate impact provisions of Title VII against state government without proof of discriminatory purpose); *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978) (enforcing the sex discrimination provisions of Title VII against municipal insurance and pension plans); *see also Clanton v. Orleans Parish School Bd.*, 649 F.2d 1084 (5th Cir. 1981) (enforcing the Pregnancy Discrimination Act against local government).

In short, "Congressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth amendments is unquestioned." *Jones v. City of Lubbock*, 727 F.2d 364, 373 (5th Cir. 1984). It is part of the warp and woof of our law. The City must show that RFRA is somehow uniquely different from all these other laws that go beyond judicial interpretations of the Amendments. The City's vague claims of what is unique about RFRA amount to little more than that the City doesn't

like what Congress did or how Congress went about it. But how and when to exercise this prophylactic enforcement power is exclusively committed to Congress, and the standard of judicial review is the broad rational basis test of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (quoting *McCulloch*); *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924) (citing *McCulloch*); *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879) (paraphrasing *McCulloch* without citation).

This does not mean that the Congressional enforcement power is a blank check. As with any other source of Congressional authority, Congress has no power to violate any constitutional right adjudicated by the courts. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982); *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). The restrictions on racial preferences announced in recent decisions go to this limitation on Section 5 power; to the extent that whites have judicially enforceable constitutional rights to be free of affirmative action or race-based districting, Congress cannot reduce or limit those rights. *See, e.g., Bush v. Vera*, 116 S.Ct. 1941 (1996); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2111 (1995).

Thus, a law prohibiting or restricting the free exercise of religion would not be a law to enforce religious liberty. An application of RFRA that violates the Establishment Clause, if any such application ever arises, would be unconstitutional. But it is frivolous to claim that RFRA generally or on its face violates the Establishment Clause. RFRA merely exempts religiously motivated conduct from burdensome regulation. This Court has unanimously upheld such exemptions against Establishment Clause attack, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327

(1987), and it affirmatively invited such exemptions in *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

Second, Congressional power under Section 5 is subject to other express allocations of power in the Constitution. This is why the Court invalidated a law granting eighteen-year-old citizens the right to vote in state elections. *Oregon v. Mitchell*, 400 U.S. 112, 119-30 (1970) (opinion of Justice Black); *id.* at 152-213 (opinion of Justice Harlan); *id.* at 293-96 (opinion of Justice Stewart, joined by Chief Justice Burger and Justice Blackmun). Four of these Justices relied on the express recognition of state voting rules in Article I, Section 2, and Justice Harlan relied on what he considered to be the clear intent of the Framers to similar effect.

RFRA raises no issue under this limit on Section 5 power. The Constitution does not recognize or preserve any specific state power to burden or regulate religion. The state regulatory powers affected by RFRA are part of the general reserve of state powers, fully subject to the Fourteenth Amendment.

Third, Congress may not assert its Section 5 powers as a sham to achieve ends unrelated to the Fourteenth Amendment. Congress must act to protect values that the Fourteenth Amendment also protects. Some Justices have suggested that Congress has no Section 5 power to forbid discrimination on the basis of a classification that has never received any constitutional protection by judicial interpretation. *EEOC v. Wyoming*, 460 U.S. 226, 263 (1983) (Chief Justice Burger, dissenting, joined by then Justice Rehnquist and Justices Powell and O'Connor). The same four Justices suggested that Congress has no Section 5 power to forbid practices that it authorizes the federal government to engage in, because that authorization would imply that Congress does not really think the practices must be banned to enforce constitutional rights. *Id.* But these

Justices reaffirmed Congressional power "to enact legislation that prohibits conduct not in itself unconstitutional," either "to guard against encroachment of guaranteed rights or to rectify past discrimination" or to invalidate state laws that are "too intrusive on federal rights." *Id.* at 261-62.

RFRA raises no plausible issue concerning its connection to the Fourteenth Amendment, whatever test of nexus the Court might ultimately adopt. RFRA applies to federal law as well as state law, and it protects only conduct that is the exercise of religion within the meaning of the Constitution as interpreted by the judiciary. 42 U.S.C. §2000bb-2(4) (1994). RFRA unambiguously protects constitutional values; indeed, it is entirely confined to conduct that is constitutionally protected. Only the extent of the protection has been increased.

The City errs in arguing that this independent Congressional power to enforce the Fourteenth Amendment is somehow at odds with separation of powers. Rather, it is part of the genius of separation of powers. Liberty is most secure when all three branches have independent power to protect it; this is why Congress can expand but not contract the scope of Fourteenth Amendment liberties. *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). The Framers of the Reconstruction Amendments deliberately created independent enforcement power both in Congress and the courts to reduce the risk that the Amendments would fail to achieve their purpose. That risk was real; the severity of the risk was most obviously revealed by the long period of Jim Crow.

Each branch brings different institutional strengths to the protection of liberty. *Employment Div. v. Smith*, 494 U.S. 872 (1990), is in part about the institutional limitations of the judiciary: that a religious "exemption is permitted, or even that it is desirable, is not to say . . . that the

appropriate occasions for its creation can be discerned by the courts." *Id.* at 890. But legislatures have their own institutional limitations, especially their inability to protect "those religious practices that are not widely engaged in." *Id.* By creating judicially enforceable statutory rights, Congress can call on powers of the judiciary that the Court feared to invoke on its own, and because the rights are statutory, Congress retains political responsibility and the capacity to respond if judicial interpretation imposes costs that are politically unacceptable. The resulting collaboration between the branches provides a stronger protection for liberty than either branch could provide alone. There is nothing anomalous about this; this is separation of powers at its best.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 26, 1996

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
F I L E D
May 9 1995

CHARLES R. FULBRUGE III
CLERK

No. 95-00067
USDC No. SA-94-CA-0421

P.F. FLORES, ARCHBISHOP
OF SAN ANTONIO,

Plaintiff-Petitioner,

and

UNITED STATES OF AMERICA,

Movant-Petitioner,

versus

CITY OF BOERNE,

Defendant-Respondent.

Petitions for Leave to Appeal
an Interlocutory Order

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

BY THE COURT:

ORDER
No. 95-00067

When a district court certifies an order pursuant to 28 U.S.C. § 1292(b) in which a Fed. R. Civ. P. 54(b) certification is more appropriate, we view the certification as brought pursuant to Rule 54(b). See DeMelo v. Woolsey Marine Indus., Inc., 677 F.2d 1030, 1032 (5th Cir. 1982). By holding the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb through 2000bb-4, unconstitutional, the district court effectively eliminated the first cause of action of P.F. Flores, the Archbishop of San Antonio, Texas.

"It is settled that Rule 54(b) is limited to orders that would be 'final' if entered in a simple single-claim, two-party case." DeMelo, 677 F.2d at 1032. "[W]hen the facts give rise to more than one legal right or cause of action, and the two grounds of recovery are not mutually exclusive, there are multiple claims which can be separately appealed upon certification under Rule 54(b)." H & W Indus., Inc. v. Formosa Plastics Corp., USA, 860 F.2d 172, 176 (5th Cir. 1988). Therefore, IT IS ORDERED that the appeal is GRANTED pursuant to Rule 54(b).

IT IS FURTHER ORDERED that the expedited briefing schedule as proposed in the government's motion to amend briefing schedule filed April 14, 1995, is GRANTED. The request by the City of Boerne, Texas, for this court to certify to the Supreme Court the legal question of the constitutionality of RFRA, see 28 U.S.C. § 1254(2), will be considered by this court after the parties have filed their briefs.

[initialed at bottom of first page]
RHB 4/22/95 EJH 5/2 FPB 5-5-95